Supreme Court, U.S.
FILED
JUL 13 2006
OFFICE OF THE CLERK

1

No. 06-781

IN THE

United States Supreme Court

SARAH HENDRIX,

Petitioner.

v.

HENRY PAULSON, SECRETARY OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES OF AMERICA, RICHARD BYRD, MICHAEL MCBRIDE, JOHN BUTKOVICH, WANDA EDMONDSON, TY AYRES and WILLIAM ZACHERY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Sarah Hendrix
Pro Se
134 Summerset Lane
Atlanta, GA 30328
(770) 396-0716 (phone/fax)

July 12, 2006
Revised September 17, 2006
Revised November 22, 2006

Robert David Powell
Lori M. Bernek
US Attorney
Northern District GA
75 Spring Street, S.W.
600 U.S. Courthouse
Atlanta, GA 30303
(404) 581-6004
(404) 581-6350

QUESTION PRESENTED

1. Whether the aggressive use of summary judgment and the arbitrary manipulation of procedures in Title VII discrimination cases is denying plaintiffs their Constitutional Right to their 'day in court' under the Seventh Amendment and, therefore, in the instant case, allowing powerful Internal Revenue Service employees the ability to continue their illegal activities without any repercussion.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties Appearing here and in the court below. The Petitioner here and in the United States Court of Appeals for the 11th Circuit is Sarah Hendrix. The Respondents here and in the United States Court of Appeals for the 11th Circuit are Henry Paulson, Secretary of the Department of the Treasury of the United States of America, Richard Byrd, Michael McBride, John Butkovich, Wanda Edmundson, Ty Ayres, and William Zachery in their official capacity and Richard Byrd, Michael McBride, John Butkovich, Wanda Edmundson, Ty Ayres, and William Zachery in their unofficial capacity.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

PRO SE STATEMENT

Ms. Hendrix apologizes to the Court for bringing this Writ without being properly represented by counsel. However, it has been difficult to find an attorney who is not personally vulnerable to enticements made by the Internal Revenue Service. It is Ms. Hendrix's belief that two of her previous counsels were so vulnerable. In fact, one former counsel has acknowledged in a recorded conversation with Ms. Hendrix the *quid pro quo* that he accepted from the IRS to the detriment of his representation of her. Ms. Hendrix submitted that information in affidavits to the District Court. [CR.56, CR.253]. Ms. Hendrix has discussed her case with two (2) different reputable attorneys with expertise in employment law who are willing to take her case to trial if it is remanded back to the District Court. Ms. Hendrix is well aware of the perils of representing herself at trial and would not make that mistake.

TABLE OF CONTENTS

Page No.

Question Presented i

Parties to the Proceeding and Corporate Disclosure Statement ii

Pro Se Statement ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Regulatory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 14

Review is Warranted by the Important Interests at Stake 27

Conclusion 28

TABLE OF AUTHORITIES

Cases: **Page No.**

Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973) 21

Alioto v. Marshall Field's & Co., 77 F.3d at 936 26

C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 44 (1st Cir. 1998) 26

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15, 16

Dayco, 523 F.2d at 393. 25

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (en banc) 22

Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) 22

Herron v. Beck, 693 F.2d 125 23

Iadimarco v. Runyon, 190 F.3d 151. 17

Jones v. Auto Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990) 21, 25

Marine Coatings, 792 F.2d at 1568 22

McCormick v. District of Columbia, 554 F. Supp. 640. . . . 17

Page No.

McGarry v. Board of County Comm'rs, 175 F.3d 1193 (10th Cir. 1999) 18

Milburn v. United States, 734 F.2d 762, (11th Cir. 1984). 22

Parks v. Marco-Dynamics, Inc. 121 Ariz. 517 21

Plante v. Shivar, 540 F.2d 1233 (4th Cir. 1976) 21

Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan 662 F.2d 641, 645 (9th Cir. 1981) 26

Property Management & Investments, Inc., 752 F.2d at 606 22

Rockefeller Ctr. Props., 184 F.3d 280, 287 (3d. Cir. 1999) 24

San Pedro Hotel Co. v. City of Los Angeles 159 F.3d 470, 477 (9th Cir. 1998) 26

Sawyer v. Russo, 19 FEP 44 (D.D.C. 1979) 18

Wilson-Cook, 942 F.2d 247. 22

RULES:

Fed. R. Civ. P. 12(b) 1, 15, 20-22, 24-25

Fed. R. Civ. P. 56(c). 2, 15-16, 21

Fed. R. Civ. P. 56(f). 21

Page No.

STATUTES:

U.S. Constitution Amend. VII. 14

2 U.S.C. § 2000e-3(a) 8

5 U.S.C. 1221 9

42 U.S.C. 1985 (1), ... 9

APPEDIXES:

A. 2/08/05 Court of Appeals Order

B. 2/22/05 District Court Order

C. 4/14/06 Court of Appeals Rehearing Request Decision

D. 5/31/06 Petition for Rehearing En Banc

E. 6/01/06 Court of Appeals Letter

F. 6/15/06 Court of Appeals Letter

G. District Court Doc. 243 – Material Facts Over Which Plaintiff Contends There is a Genuine Issue to be Tried

H. District Court Doc 253 – Plaintiff's Affidavit Providing Additional Information

I. Ms. Hendrix's January 3, 2005 Affidavit

J. U.S. District Court Certificate of Readiness of Record and Civil Docket

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ms. Sarah Hendrix, respectfully petitions this Court for a Writ of Certiorari to review the judgment rendered in this case by the 11th Circuit Court of Appeals.

OPINIONS BELOW

The order of the court of appeals is unreported [Appendix ("App.") A]. The opinion of the district court is unreported [App. B]

STATEMENT OF JURISDICTION

The 11th Circuit Court of Appeals entered its order February 8, 2006. The 11th Circuit denied Petitioner's Petition for Rehearing on April 14, 2006 and her Petition for Rehearing En Banc on June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Seventh Amendment provides that "[i]n Suits at common law, ..., the right of trial by jury shall be preserved."

Fed. R. Civ. P. 12(b) states that when matters outside the pleading are presented to and not excluded by the court, a motion to dismiss "shall be treated as one for summary judgment and disposed of as provided in Rule 56."

Fed. R. Civ. P. 56(c) states that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing."

Fed. R. Civ. P. 56(c) states "The judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

A. Ms. Hendrix's Termination

Ms. Sarah Hendrix (White female), Petitioner/Appellant/ Plaintiff ("Ms. Hendrix") was employed by the Internal Revenue Service ("IRS") as an International Examiner ("IE") at the Manhattan District of the IRS, where she performed with documented excellence for close to three years.

Within one month of Appellants' transfer to the Atlanta District of the IRS in January 1994, the individually named Respondents/Appellees/Defendants ["Respondent Edmundson" (Black female), "Respondent Zachery" (Black male), and "Respondent McBride" (Black male)] conspired to undermine Ms. Hendrix's professional and personal reputation in order to justify giving an IE position to their pre-selected unqualified Black candidate, Mr. Brian Word ("Mr. Word") who:

1) Was NOT a CPA as other candidates and Ms. Hendrix are.

2) Had NO International tax training either inside or outside the Internal Revenue Service as Ms. Hendrix did (Ms. Hendrix had 1 year of International Tax at Pace University, NY, NY and the full 16 weeks of internal IRS international tax training).

3) Had NO International tax experience as Ms. Hendrix did (Ms. Hendrix was an International Tax Manager at CitiBank).

4) Had NOT previously held the IE position as Ms. Hendrix had [Ms. Hendrix was an IE in the Manhattan District of the IRS from 1991-1993].

Their unqualified Black candidate, Mr. Word, was placed in the IE position one (1) month *before* the position was officially announced for competition for other IRS employees. Ms. Hendrix provided the District Court with proof of the pre-selection attached as Exhibit # P 24 to Ms. Hendrix's January 3, 2005 Affidavit ("Affidavit") submitted with Plaintiff's Response(s) to Defendant's Motions to Dismiss [CR 238 - CR 240].

Respondent Zachery signed the IRS Form # 52, Request for Personnel Action, transferring Mr. Word into the IE position on November 18, 1994. [Affidavit, Exh.# P 24, CR 238 - CR 240]

The opening date of the Vacancy Announcement for the IE position was December 27, 1994 and the closing date was January 10, 1995 [Affidavit, Exh.# P 23, CR 238 - CR 240].

The same Individual Respondents then rigged the competition by using an Alternative Ranking System to insure

that their unqualified candidate was ranked as 'best qualified' for the IE position. The Federal Labor Relations Authority concluded in an October 31, 1996 decision, that the Alternative Ranking System was incorrectly used by the IRS when ranking the IE position and when determining that Word was the best-qualified individual for the position. [Affidavit, Exh # P-88, CR 238 - CR 240].

The Individual Respondents continued on a pattern of discriminatory, retaliatory, illegal and unethical conduct until Ms. Hendrix's wrongful, retroactive termination in January 1998 effective December 1997. This conduct included, but is not limited to, participating in several *quid pro quo's* and giving away over $2,300,000 of the American taxpayer's money in exchange for negative letters and reports about Ms. Hendrix. Ms. Hendrix provided proof to the District Court of two (2) such *quid pro quo's* identified as Taxpayer # 4 (attached as an Affidavit to Ms. Hendrix's May 4, 2001 Motion for Reconsideration) [CR 56]) and Taxpayer # 1 (Affidavit, Plaintiff's Response to Motion(s) to Dismiss [CR 238 - CR 240])

The Individual Respondents actions over a four-year period resulted in the devastation of Ms. Hendrix's mental health and the ruin of her professional and personal reputation. The hostile environment was memorialized in a March 1996 note to Ms. Hendrix from a fellow IRS employee that stated:

> "It's a shame that you have to do that. She [meaning Respondent Edmundson] really means war. It's awful to be under such scrutiny [sic]. I had no idea that it was at that point. Nevertheless, remember God is still in control and he is the final judge and the only one you should fear" [Affidavit, Exhibit # P-6, CR 238 – CR 240].

The other three (3) Individual Respondents ["Respondent Byrd" (Black male), "Respondent Ayres" (Black male) and

"Respondent Butkovich" (White male)] participated in a cover up of the other Respondent's illegal, unethical and discriminatory conduct. This cover up included lying to US Senator Coverdell during the congressionally ordered investigation of their illegal actions. [Affidavit, Exh.# P 96, P 97, CR 238 - CR 240]

Before litigation commenced, Ms. Hendrix filed:

One (1) Complaint with the National Labor Relations Authority ("NLRA") [**# AT-CA-60521**]

Four (4) EEO Complaints: (**1**) [**# 96-2290**, June, 1996 – Listed 18 different specific instances of discriminatory and retaliatory conduct. Coincidentally, Respondent McBride signed the Form # 52, Request for Personnel Action removing Mr. Word from the IE position on August 23, 1996, two (2) weeks after EEO Complaint # 1 [# 96-2290] went formal on August 9, 1996. [Affidavit, Exh. # P-30, CR 238 –CR 240], (**2**) [**# 97-1320**, May, 1997 – Alleged age, race and sex discrimination and the interference of the investigation ordered by Congress of those illegal actions by Respondent Butkovich, Respondent McBride and Respondent Ayres], (**3**) [**# 97-1372**, October, 1997 – Alleging retaliation and proposed termination adverse action by Respondent McBride who issued a "60 day Opportunity" Adverse Action Letter], and (**4**) Ms. Hendrix filed a fourth (4th) EEO Complaint after her termination [**# 98-1171**, February, 1998 -Citing wrongful termination].

One (1) Complaint with the Office of Special Counsel [**# MA-97-1972**, August, 1997]

[Affidavit, Exhibits # P-60, P-66, P-105, P-107, P-125 and P-128 CR 238 - CR 240]

During 1996 – 1998, Ms. Hendrix, provided information about the Individual Respondents illegal conduct to Senator Trent Lott, Senator Paul Coverdell, Representative Newt Gingrich, Representative Max Cleland and Representative Nancy L. Johnson who states in a August 23, 1996 letter to Mr. Gary Bell, Internal Inspection, IRS:

"Ms. Hendrix has made serious allegations about her group manager, Ms. Wanda Edmundson. In brief, Ms. Hendrix believes that Ms. Edmundson has manufactured complaints about Ms. Hendrix's job performance in order to "get rid" of Ms. Hendrix. Ms. Edmundson's conduct allegedly includes making adjustments to assessments which Ms. Hendrix has made against taxpayers she has audited... Ms. Hendrix believes that Ms. Edmundson has systematically set about to destroy Ms. Hendrix's career and, in doing so, at a minimum has violated IRS ethical standards and may have gone so as to violate tax laws. Ms. Hendrix has also indicated that she has brought this information to senior officials in the Atlanta District, but she does not believe that there has been a fair and impartial investigation of this matter. I consider Ms. Hendrix's allegations to be very serious and hereby request an internal audit of this matter." [Affidavit, Exhibit # P-75, CR 238 - CR 240].

It is this letter that finally started the investigation ordered by Congress that Respondent Butkovich, Respondent McBride, Respondent Ayres, and Respondent Byrd intervened in order to cover their illegal activities. The coverup was the subject of Ms. Hendrix's second EEO Complaint [# 97-1320].

Respondent Ayres misrepresented Respondent McBride's position at the IRS to Senator Coverdell's office by stating that Respondent McBride (an individual named in Ms. Hendrix's first EEO complaint, an examination division Branch Chief and Respondent Edmundson's direct line manager) was handling the investigation of the illegal actions. In a May 13, 1996 letter to Senator Coverdell, Respondent Ayres stated:

"This is in response to your inquiry on behalf of Ms. Sarah Hendrix who expressed concern regarding her employment with the IRS. This matter has been referred to our Internal Security Division, which has responsibility for investigating such items. If you or your constituent have any further questions **please contact Michael A. McBride**." [Affidavit, Exhibit # P-67, CR.238, CR.239 and R.240].

A January 27, 1997 letter from Senator Coverdell to Respondent McBride states:

"Enclosed please find additional information received from Ms. Sarah Hendrix regarding ongoing investigations regarding herself and a supervisor. It is requested that this new information be given appropriate consideration when evaluating her case." [Affidavit, Exhibit # P-97, CR 238 - CR 240].

Thus, Respondent McBride, was "handling" the investigation of his as well as Respondent Zachery's and Respondent Edmundson's illegal actions. An October 10, 1997 letter from the U.S. Office of Personnel Management to Senator Trent Lott states:

"Ms. Hendrix, ...alleges that the IRS has instituted an official policy against whites that resulted in her non-selection for a position as an International Examiner, ..., the position in Atlanta was given to an African-American who was less qualified than she, ...Your letter to OPM appears to have a well-documented and credible inquiry worthy of review" [Affidavit CR 238 – CR 240].

In 1997, the IRS Affirmative Action Program ERR-16 was declared unconstitutional by a Louisiana District Court.

The decision states "To bolster management's accountability, ERR-16 recommends that as part of the annual performance evaluation each manager efforts towards implementation of ERR-16 be monitarly rewarded and lack of such efforts be punished." [Affidavit, Exh.# P 129, CR 238 - CR 240]

From 1996 through 1998, Ms. Hendrix also provided information about the Individual Respondent's illegal actions to the Department of Treasury Inspector General's office. Ms. Hendrix spoke at Rep. Newt Gingrich's public forum (an event documented in the Atlanta Journal & Constitution) and to other news media [Affidavit, Exh. # P-133 CR 238 – CR 240].

On October 10,1997 Appellant was placed on administrative leave. On November 28, 1997, Appellant filed the Original Complaint in this action after receiving a right to sue letter from the EEOC. On December 27, 1997 Ms Hendrix wrote to IRS Acting Commissioner Michael Dolan in a last ditch attempt to inform IRS management of the illegal actions of the Individual Respondents. On January 10, 1998, Ms. Hendrix was retroactively fired effective December 29, 1997.

B. Proceedings Below

1. Filing of Suit. On November 28, 1997, Ms. Hendrix filed the Original Complaint in this action. The Complaint stated claims describing a continuing pattern of discriminatory and retaliatory acts [Count 1 & 2 – Title VII Discrimination and Retaliation 2 U.S.C. § 2000e-3(a)] and named the Secretary of the Treasury as the only defendant [CR.1]. Once Ms. Hendrix received notification that she was retroactively fired effective December 29, 1997 she then filed a fourth (4th) EEO Complaint [**# 98-1171**, February, 1998 – citing wrongful termination]. On July 20, 1998 Ms. Hendrix's Motion to Amend Complaint ("First Amendment") adding wrongful termination to the retaliation claim was granted and filed by order of the Court. [CR.11].

On January 29, 2001, Ms. Hendrix filed a Motion to File a Second Amendment to the Complaint ("Second Amendment") that added six (6) Individual Defendants (Respondents

Edmundson, McBride, Zachery, Ayres, Butkovich and Byrd) and three (3) additional Claims [Count 3 – Violation of the Whistleblower Protection Act 5 U.S.C. 1221, Count 4 – Conspiracy to Interfere with Civil Rights 42 U.S.C. 1985 (1), and Count 5 – Intentional Infliction of Emotional Distress, CR.52]. After several motions filed by US Attorney Powell, the Court found the Second Amendment to be *timely filed* and granted it on August 13, 2001 [CR.76].

On January 23, 2003 the Clerk of the District Court found the Individual Respondents to be in DEFAULT because, some seventeen (17) months after the filing, they had still not filed answers to the Second Amendment [CR.103]. Once they were found to be in default, instead of filing an answer, the very next day (on January 24, 2003) the Individual Respondents filed five (5) Motions to Dismiss or Summary Judgment (one for each Respondent except Respondent Byrd who falsely claimed that he had not been served) [CR 104 – CR 108]. On February 10, 2003, Ms. Hendrix filed a Motion for a Third Amendment to the Complaint ("Third Amendment") to correct a pleading technicality in the Second Amendment. On June 27, 2003 the Respondents "renewed" their Motions to Dismiss [CR 146]. On July 2, 2003, Magistrate Judge Joel Feldman RETROACTIVELY granted the Individual Respondents Motions to Dismiss effective June 20, 2003 [CR 147, CR 151].

Over a year later, on July 30, 2004, District Court Judge Story VACATED Magistrate Judge Feldman's decision to Dismiss (Judge Feldman had based his decision on misrepresentations made by US Attorney Powell) and AGAIN granted the Second Amendment [CR 165]. The Court also granted the Third Amendment. On September 23, 2004 some three (3) years after the Second Amendment was first granted, the Individual Respondents finally filed cursory answers to the

Amendments [CR 190 – CR 196].

During September of 2004, Ms. Hendrix's counsel, Mr. Darrin Keaton ("Keaton") informed Ms. Hendrix that he was receiving notices from the IRS about his personal taxes. Ms. Hendrix, although she did not see the contents of the IRS notices, directed Keaton on how to respond to them.

Final discovery ended on October 28, 2004. On November 2, 2004, *five days after the close of discovery*, the Individual Respondents filed the Notice of Substitution of United States as Defendant for Tort Claims against Individual Capacity Defendants ("Notice of Substitution") [CR 205]. On November 23, 2004, Ms. Hendrix filed a response to the Notice of Substitution and a Motion for Hearing and/or De Novo Review of Defendant's Notice of Substitution of United States as Defendant for Tort Claim [CR 206, CR 214]. The next day, on November 24, 2004, the Respondents filed a Motion of the United States to Dismiss or for Summary Judgment [CR 207] and on November 26, 2004, for Defendant John Snow [CR 209] and for Defendants Ty Ayers, John Butkovich, Richard Byrd, Wanda Edmundson, Michael McBride and William Zachery [CR 211].

On January 7, 2005, Ms. Hendrix filed a Response to each of the Motions as well as three (3) different Responses to Defendant John Snow [CR.239], United States [CR.238] and Individual Defendants [CR.240] Statement of Material Facts Not In Dispute (Material Facts Over Which Plaintiff Contends There Exists A Genuine Issue To Be Tried) ("Statement of Material Facts in Dispute") [CR 241 - CR.243].

On January 25, 2005, the Individual Respondents filed a Motion to Strike [CR 246] ALL 21 of the Depositions taken by Ms. Hendrix, Ms. Hendrix's Affidavit, and Ms. Hendrix's

Statement of Material Facts in Dispute. Keaton, Ms. Hendrix's counsel, REFUSED to respond to the Respondents Motion to Strike.

From September 2004 through the February 22, 2005 Order, Ms. Hendrix was effectively proceeding as a *pro se* plaintiff. Once Keaton began receiving IRS notices about his personal tax situation in September 2004, his *only* participation is the case was to sign what Ms. Hendrix prepared. Ms. Hendrix was forced to file a response herself or face having those records thrown out by the court [Response to Motion to Strike, CR 248].

On February 8, 2005, a hearing was held in front of Judge Richard W. Story regarding the 'scope of employment' issue [CR.247]. Before the hearing, Keaton, US Attorney Powell and Judge Story met for fifteen (15) minutes behind closed doors without Ms. Hendrix present. During the hearing **Judge Story restricted Ms. Hendrix's and Keaton's testimony to a time period AFTER the Respondents committed their illegal acts.** At the end of the hearing, Judge Story allowed all parties five (5) days to file additional information regarding the "scope of employment" issue to be considered by the Court.

Ms. Hendrix has not spoken to Keaton since that hearing. When Keaton refused to answer her phone calls or respond to her e-mails, Ms. Hendrix filed the information requested by Judge Story as an Affidavit Supplying Additional Information in Response to February 8, 2005 Hearing [CR 250] on February 14, 2005. Ms. Hendrix attempted to inform the District Court of the actual events surrounding her filing of the Response to Defendants' Motion to Strike by filing an Affidavit with the court [CR 253, Attached as Appendix H]. ***At this point, the Court was obviously aware that the Appellant was operating on her own.***

2. District Court Dismissal. On February 23, 2005, *a mere eight (8) days after the last filing*, the District Court issued a 41-page Order dismissing all five (5) claims of Ms. Hendrix's case [Appendix ("App.") B]. Many of the arguments used were the exact arguments ***previously presented*** by US Attorney Powell and ***previously dismissed*** by the Court. The District Court's response to Keaton's total lack of fiduciary responsibility was to chastise Ms. Hendrix

> ..., it has come to the Court's attention, that on February 9, 2005 Plaintiff filed a response to Defendants' Motion to Strike at docket number [CR 248] where she signed the name of counsel without her attorney's express permission to do so. This kind of behavior is totally unacceptable behavior before the Court, ..., Since this case is due to be closed, the Court declines to sanction Plaintiff at this time" [February 22, 2005 Order, CR.251.Page B-31, Note 22]

Keaton informed Ms. Hendrix of the Court's February 22, 2005 decision by e-mail *eighteen (18) days after he was notified of it*. Therefore, Ms. Hendrix did not have time to file a Motion for Reconsideration of the decision. Ms. Hendrix timely filed an Appeal with the 11th Circuit Court of Appeal on March 31, 2005.

3. 11th Circuit Court of Appeals Dismissal Ms. Hendrix timely filed the Appeal with the 11th Circuit on March 31, 2005. Ms. Hendrix's Appellant's Brief was filed on September 9, 2005 and her Reply Brief was filed on November 1, 2005. In both Briefs Ms. Hendrix requested an Oral Hearing but without any explanation she was not allowed that opportunity.

The unpublished PER CURIAM Opinion of the Court was issued on February 8, 2006 [App. A]. On March 27, 2006, Ms. Hendrix filed a Petition for Rehearing based on the MANY disputed, overlooked and misapprehended issues in the February 8, 2006 Order. For instance, the Court agreed

with and made decisions based on the District Court Order's false statement that Ms. Hendrix had only filed three (3) EEO complaints when in fact she had filed four (4) complaints [# 96-2290, # 97-1320, # 97-1372 and # 98-1171].

The EEO Complaint that was 'overlooked' contained the very information that the District Court stated in their Order was necessary to uphold Ms. Hendrix's Whistleblower and Retaliation claims. Also, Ms. Hendrix's Wrongful Termination claim was incorrectly thrown out because the Court stated that there were only 113 days, not the required 120 days between the filing of EEO Complaint # 98-1171. The EEO #4 complaint was signed February 23, 1998, and formally filed March 4, 1998. The First Amendment was filed per Court Order July 17, 1998 [CR 11]. Thus, more than 120 days had passed between the two (2) filings. Even if both Courts could not count, they should have noticed the statement in the First Amendment, Paragraph #X "EEO Specialist Mary Peace has contacted Plaintiff's attorney and indicated *that she may proceed to litigate the termination as part of her ongoing lawsuit*" [CR 12].

Despite these, and many other, disputed, overlooked and misapprehended issues, the 11th Circuit responded to Ms. Hendrix's Rehearing request with a PER CURIAM statement "The petition for rehearing filed by the Appellant, Sarah Hendrix is DENIED." Sixteen (16) days later on a holiday – Good Friday [App. C]. The denial was signed by Justice Fay who is a "senior member" not a regular panel member of the 11th Circuit Court.

On May 31, 2006, Ms. Hendrix filed a Petition for Rehearing En Banc. ("Petition En Banc") [App. D]. On June 1, 2006, the 11th Circuit Court notified Ms. Hendrix that she needed to file a Motion for Leave to File for Rehearing

En Banc Out of Time ("Motion for Leave") [App. E]. Ms. Hendrix filed the Motion for Leave on June 12, 2006 [App E]. On June 15, 2006, Ms. Hendrix received a letter stating "Please disregard letter dated 6/01/06. Your petition for rehearing was denied on 4/14/06. You may petition for certiorari to the United States Supreme Court." [App F].

In a June 17, 2006 conversation the 11th Circuit Court Clerk informed Ms. Hendrix that the ninety-day (90) grace period that Ms. Hendrix had to file a Writ of Certiorari in the Supreme Court started retroactively beginning April 14, 2006. Thus Ms. Hendrix had 30 days to prepare this Writ.

Ms. Hendrix is now appealing to the Supreme Court with the rapidly diminishing hope that she can still receive justice in the United States court system and finally get her day in court per the Seventh Amendment.

REASONS FOR GRANTING THE WRIT

C. Argument and Law.

From the time of the founding of the United States, the jury trial was recognized as an important part of the governmental structure. The Seventh Amendment, adopted in 1791, established the right to a jury trial in civil cases in federal court.[1]

Recently, the courts have used summary judgment to reject claims in discrimination cases on a variety of bases many times pushing the envelope beyond the scope of factual situations deserving summary judgment. The manner in which procedural tools are applied to discrimination cases is often "outcome-determinative." The end result is that

1 U.S. Constitution Amend. VII.

plaintiffs are losing their opportunity to test their facts before a jury and are instead bound by the decision of a single judge on less than a full record.

1. Ms. Hendrix was denied her Seventh Amendment right to a jury trial because of procedural manipulations that have nothing to do with the merits of her claims.

"The right of trial by jury, ..., is perpetually spoken as the palladium of our public rights and liberties; and in all the various fluctuations of public opinion, it has remained untouched and unsuspected."[2]

Judges have increasingly used summary judgment to dismiss employment discrimination cases. For instance, in the Northern District of Georgia, of 76 discrimination cases recently filed against the IRS all but one were dismissed at summary judgement. The only plaintiff who did prevail past summary judgement was a law clerk for a Magistrate Judge in the same court where he filed his case before he was employed by the IRS and before he sued the IRS for discrimination. Coincidence?

Ms. Hendrix is appealing to the Court requesting that judges be required to apply the standards of Rule 12(b), Rule 56(c) and developed case law *uniformly* so as to not compromise the litigants' constitutional rights to a day in court as was done in the instant case.

As historically applied by the courts the summary judgment standard is that no "reasonable jury" could find for the non-moving party under the facts of the case. Of the summary judgment *trilogy*, the District Court and the 11th Circuit cited Celotex[3] when granting summary judgment

2 John C. Hogan, Joseph Story on Juries, 37 Or. L. Rev 234 (1958) (quoting Justice Story's article "Jury" published in 1831).

3 Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

in Ms. Hendrix' case. Celotex recognized that a defendant could obtain summary judgment not only by putting forth affirmative evidence that the plaintiff's case was meritless, but also by showing that the plaintiff would lack evidence to prove some essential element of her claim.

Nowhere does it state that the Courts could or should ignore legitimate evidence that is presented as was done in Ms. Hendrix's case.

Rule 56(c) required the moving party to show initially the absence of a genuine issue concerning any material fact. "Rule 56 must be construed with regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis."[4]

The Respondents did NOT meet their burden in this case. They have NOT shown that Ms. Hendrix's claims have no factual base. None of the Individual Respondents filed affidavits. In fact the Respondents filed a Motion to Strike 21 depositions, Ms. Hendrix's Affidavit with the attached 133 Exhibits, three (3) filings by Ms. Hendrix's [Material Facts In Dispute, CR 241, CR 242, CR 243] so that there would be NO information in front of the court to make the determination [CR 246].

The Motion to Strike effort was just another example of the procedural manipulation of this case that Ms. Hendrix has had to work around in the last eight (8) years in order to keep

4 Celotex Corp. v. Catrett, 477 U.S. at 327 (1986).

her case moving forward. Ms. Hendrix, on the other hand, has filed multitudes of evidence including over 133 Exhibits (produced by Respondents during discovery) that proved her claims. Also, on May 4, 2001, she attached over 175 pages of her own Exhibits to her Motion for Reconsideration that also proved her claims [CR 56].

Further, Ms. Hendrix provided the District Court proof on paper with her Exhibits that:

1) Respondent Zachery (Black male) signed the IRS Form # 51 that placed an unqualified black candidate in the International Examiner ("IE") position one month BEFORE the position was announced for competition by other IRS employees.

Respondent McBride (Black male) told Ms. Hendrix that "she was not going to get ahead in line of 'his people' for the IE position." The remark was overheard by an independent third party. "All that should be required to establish a prima facie case in the context of 'reverse discrimination' if for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based on a trait that is protected under Title VII"[5]

2) Respondent Edmundson incorrectly and without notice lowered Ms. Hendrix's evaluation so that she could not compete for the IE position that she had previously successfully held in the Manhattan District of the IRS. Respondent Edmundson (Black female) told Ms. Hendrix that the IE position was a 'minority' position. That same day Ms. Hendrix memorialized this conversation with several individuals including IRS employees. "After a black female

5 Iadimarco v. Runyon, 190 F.3d 151.
6 McCormick v. District of Columbia, 554 F. Supp. 640.

was promoted to a position in which she served as the boss of the white plaintiff, she had the plaintiff's performance rating lowered. Noting that government personnel procedures were not followed, the court held that the alleged assertions that the plaintiff's writing skills were deficient were merely pretext,"[6] "Plaintiff told that the hires were 'minority hires.' Held that the plaintiff had presented sufficient evidence to support a claim of reverse discrimination and retaliation. Summary Judgment for the defendant was reversed."[7]

3) The Federal Labor Relations Authority determined that the IRS personnel department, under Respondent Zachery's control, incorrectly used an "Alternative Ranking System" in order to rank their unqualified black candidate, Mr. Word as the "best qualified" for the IE position. [Affidavit, Exh.# P 38, CR 238 - CR 240] "An inference of discriminatory purpose may be drawn from a supervisor's violation of regulations where such violation results in disadvantaging individuals on a racial basis."[8] Respondent McBride signed the Form # 51 removing the black candidate from the IE position after Ms. Hendrix filed her first EEO complaint citing reverse discrimination. [Affidavit. Exhibit P 30, CR 238 – CR 240]

4) Respondent Edmundson gave away over $250,000 of the American taxpayer's money in a *three week period* in exchange for negative letters written about Ms. Hendrix in order to tar her professional reputation after Ms. Hendrix complained of the Respondents' deliberate act of reverse discrimination. Ms. Hendrix can prove on paper that from 1994 through 1997 OVER $2,300,000 was traded in similar *quid pro quos*. [Affidavit. Exhibit P 32-P 36, CR 238 - CR 240]

---

7 McGarry v. Board of County Comm'rs 175 F.3d 1193 (10th Cir. 1999).
8 Sawyer v. Russo, 19 FEP 44 (D.D.C. 1979).

5) Respondents McBride, Ayres, Butkovich and Byrd intervened in the Congressionally ordered investigation of Respondent Edmundson, Respondent Zachery and Respondent McBride's illegal actions and made false statements and misrepresentations to Senator Coverdells' office because they knew that they were guilty of those actions. [Affidavit. Exhibit P 67, CR 238 – CR 240]

6) Respondent Zachery signed off on the 15-day suspension of Ms. Hendrix based on fabricated, false and **unsupported** charges that Ms. Hendrix had some how threatened Respondent Edmundson's life.

7) Respondent McBride issued the 60-day opportunity letter after Ms. Hendrix filed EEO complaint # 97-1372 that exposed his interference in the Congressionally ordered investigation of his, Respondent Edmundson's and Respondent Zachery's illegal actions.

8) Respondent McBride placed Ms. Hendrix on administrative leave after she publicly spoke at Newt Gingrich's town hall meeting about discrimination at the IRS. Ms. Hendrix's testimony appeared in an article in the Atlanta Journal & Constitution.

The Respondents, on the other hand, have provided NO evidence of any legitimate nondiscriminatory reasons for circumventing the Civil Service Rules in order to place their unqualified Black candidate in the IE position one (1) month BEFORE the position was announced for competition by other IRS employees.

The Respondents have provided NO evidence of a

legitimate nondiscriminatory reason for tarring the Ms. Hendrix's professional reputation by participating in several *quid pro quos* that resulted over $2,300,000 of the American taxpayers money being exchanged for negative letters and reports written about her.

The Respondents have provided NO evidence of a legitimate nondiscriminatory reason for retaliating against Ms. Hendrix by denying her Phase 3 On The Job Training ("OJT") when other Black IRS employees who had performed at the same or lower level were allowed the training.

Also, as the record reveals, Ms. Hendrix has *always* stated that she has been subjected to a continuing pattern of discriminatory, harassing and retaliatory actions by the Respondents that started within the first month after she transferred into the Atlanta District of the IRS.

Ms. Hendrix has never raised "disparate treatment" as an explanation for the retaliatory 15-day unpaid suspension in June 1996. Fortunately for others, Ms. Hendrix knows of NO other person similarly situated who was subjected to the continual horrendous retaliatory actions of the Respondents from 1994 through 1997. US Attorney Powell raised the issue of disparate treatment as a smoke screen to deflect the Court's attention from the real issue – **powerful IRS employees using their position and the American taxpayers' money for their own personal agenda.**

Because there is no nondiscriminatory explanation for their actions, the Respondents and US Attorney Powell have resorted to eight (8) years of misrepresentations and procedural manipulation to keep Ms. Hendrix from getting her day in court.

2. The court should grant review to determine why the 11th Circuit has followed the 'bright-line' rule in all cases except the instant case. Federal Rules 12(b) and 12(c) provide that "before a motion to dismiss may be treated as one for summary judgment, all parties must be given 'reasonable opportunity' to present all pertinent material."[9] Rule 56(c) states that the "summary judgment motion should be served as least 10 days before the time fixed for a hearing."

In most Circuits, actual notice is required because Rule 12(b) explicitly links the conversion process to Rule 56, which requires an actual 10-day notice period. If a party is not afforded the opportunity to ask for an extension under Rule 56(f), then there is a risk of granting a premature summary judgment that "railroads" the non-moving party as was done in the instant case.

The 11th Circuit Court has consistently applied the 'bright-line' rule of a 10 day notice in other cases before their court but did not do so in this case. "This circuit has consistently enforced the strict notice requirements of Rules 12(b) and 56, creating a 'bright-line' rule:

If a district court fails to comply with the ten-day notice requirement, the case will be reversed and remanded so that the district court may provide the non-moving party with adequate notice,"[10] and "the court must give the parties ten days notice that it is converting

---

9 Plante v. Shivar, 540 F.2d 1233 (4th Cir. 1976), Adams v. Campbell County School District, 483 F.2d 1351 (10th Cir. 1973). Parks v. Marco-Dynamics, Inc. 121 Ariz. 517.

10 Jones v. Auto Ins. Co. of Hartford, Conn., 917 F.2d 1528 (11th Cir. 1990).

11 Id. at 1533.

the moving party's motion to dismiss into a motion for summary judgment." The court explained that the "strict notice requirements of Rules 12(b) and 56... creat[ed] a 'bright-line' rule [of actual notice],"[11] and reasoned that a "strict interpretation of those requirements is critical because a successful summary judgment results in a final adjudication of the merits of a case." Further, the 10-day notice requirement "serves as a valuable procedural safeguard" and "ensures that the parties have the opportunity to present to the court every available argument, legal and factual..."[12]

Also, "The cases from this [11th] circuit are clear that before a motion to dismiss may be converted to one for summary judgment *the court must first communicate its intention to the parties to so treat the motion* and then allow the parties ten days to submit any relevant evidence and argument in support or opposition to the merits."[13] "It is clearly the law in this circuit that whenever a district judge converts a 12(b) motion to dismiss into one for summary judgment by considering matters outside the pleadings the judge *must give* all parties ten day notice that he is converting the motion. **Failure to give such notice will result in reversal and remand.**"[14] "We have held repeatedly that this requirement of notice will be deemed *strictissimi juris* and applies to *all* parties litigant."[15] "[T]his court has established a 'bright-line' test requiring 10-day advance notice that the court will take a motion for summary judgment under advisement as of a certain date,"[16] "no conversion occurs

---

12 Jones, 917 F.2d at 1532 (citing Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985).

13 Marine Coatings, 792 F.2d at 1568.

14 Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) (en banc) quoting Property Management & Investments, Inc. 752 F.2d at 606.

15 Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985).

16 Milburn v. United States, 734 F.2d 762 (11th Cir. 1984).

17 Wilson-Cook, 942 F.2d 247.

unless and until a court indicates that it considered all extraneous material."[17]

The District Court incorrectly converted Respondent's Motion to Dismiss into a Motion for Summary Judgment without giving the proper ten-day notice to Ms. Hendrix and without granting her a hearing thus ignoring the 11th Circuit's own 'bright-line' rule procedures. The 11th Circuit Court's February 8, 2006 Order noted the problem but in order the justify the District Court's actions, stated:

"Regardless, even if this notification was not sufficient to convert the pleading into a summary judgment motion, Hendrix has not contended, and the record does not reflect, that, following this notice, Hendrix was unaware of the court's intent and, otherwise, would have presented additional materials." [February 8, 2006 Order, Page 11, Para.1].

Ms. Hendrix disagrees with the Court's conclusion. At the time of the conversion, Ms. Hendrix was only *theoretically* represented by counsel. Once Keaton began receiving IRS notices about his personal tax situation in September 2004, his participation is the case consisted of signing what Ms. Hendrix produced if she was able to track him down. From September 2004 through the February 22, 2005 Order, she was effectively proceeding as a pro se plaintiff.

Keaton has not spoken to the Appellant since the February 8, 2005 hearing to this very day. Neither the Court nor Keaton informed Ms. Hendrix there was going to be a conversion and that she could have ten days to provide additional information in order to avoid summary judgment. The Appellant is not a lawyer. How could she be aware of a notification requirement? "We consistently have required that district courts "be particularly careful to ensure proper notice

18 Herron v. Beck, 693 F.2d 125.

to a *pro se* litigant."[18]

It also should be clear to this Court upon reviewing the docket of the case [App. J] that the Appellant would NEVER NOT file additional information in order to avoid summary judgment if she was aware that that was an option. She has repeatedly corrected the misrepresentations made to the District Court by the US Attorney. The Appellant would certainly have connected the dots better for the Court if she had been given the ten-day notice required at the time of the conversion.

This lack of notification can hardly be deemed "harmless error" since Ms. Hendrix's case has been dismissed based on incorrect information provided by the US Attorney and she was not notified of the District Court's decision by Keaton until it was too late to file A Motion for Reconsideration. Ms. Hendrix respectfully requests the Court to enforce the 11th Circuit's own 'bright-line" rule, reverse the District Court Order and remand the case for trial.

3. The court should grant review to clarify differences between circuits who enforce a 'bright-line' rule and those who do not. Rule 12(b) states that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, ..., This process is known as "conversion."[19]

A) When converting a motion to dismiss into a motion for summary judgment, Rule 12(b) requires the judge

19 Rockefeller Ctr. Props., 184 F.3d 280, 287 (3d. Cir. 1999).

to comply with the strict requirements of Rule 56, which contains an explicit 10-day notice requirement. Courts favoring actual notice have correctly interpreted Rule 12(b)'s explicit reference to Rule 56 ("treated ...and disposed of as provided in Rule 56") as requiring an actual notice period. In Jones, after the defendant attached an affidavit to its motion to dismiss, the circuit court converted it into one for summary judgment without giving actual notice of conversion. The appellate court reversed, holding that the court must give the parties ten (10) day notice."[20]

B) Actual notice is required because Rule 12(b) explicitly links the conversion process to Rule 56, which requires an actual 10-day notice period; the advantages of an easy-to implement unambiguous 'bright-line' rule are superior to a highly subjective constructive notice rule; and actual notice is more consistent with the burdens and purposes of summary judgment. The Advisory Committee Notes to Rule 12(b) affirm this interpretation. This desire for clarity is consistent with an important goal of procedural law, which is to "articulate clear, workable rules that are capable of easy interpretation by future litigants."

C) An easy-to-implement and unambiguous 'bright-line' rule requiring actual notice is vastly superior to a highly subjective rule allowing constructive notice. Actual notice creates a 'bright-line' rule that clearly communicates the court's intention to convert a motion to dismiss into one for summary judgment. It is both "easy to give and removes ambiguities."[21] Conversely, "courts that allow constructive notice rely on a highly subjective approach that relies on the

---

20 Jones v. Auto Ins. Co. of Hartford Conn., 917 F.2d 1528, 1532 (11th Cir. 1990).
21 Rockefeller, 184 F.3d at 288.
22 Dayco, 523 F.2d. at 393.

specific facts and circumstances of each case."[22]

D) Courts using constructive notice have created a hodgepodge of vague and unworkable standards. The various tests used by courts permitting constructive notice include whether the "facts and circumstances of each case" resulted in "unfair surprise,"[23] whether the parties were provided "notice" and "opportunity" to respond,"[24] and "whether the parties were "fairly apprised" of conversion,"[25] These tests in turn depend on a many other factors, including "whether the party or parties were able to conduct enough discovery prior to conversion,"[26] "the amount of time between the filing of supporting materials and the granting of the motion for summary judgment,"[27] and "whether the affected party was represented by counsel."[28]

Litigants in any given district are, therefore, forced to second-guess whether a motion to dismiss has or will be converted based on a set of poorly defined criteria. As a result, these ambiguous standards are at odds with judicial efficiency and fairness when such an unambiguous and easy-to-implement bright-line alternative exists.

E) Actual notice provides the nonmoving party with sufficient notice and, therefore, the opportunity to rebut a summary judgment motion. One of the vices of unexpected conversion "is that it denies the surprised party sufficient opportunity to bring forward factual matters which

23 Id. at 393.

24 Alioto v. Marshall Field's & Co., 77 F.3d at 936.

25 Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981).

26 Id. at 646.

27 C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 44 (1st Cir. 1998).

28 San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998).

29 Portland Retail Druggists, 662 F.2d at 645.

30 Jones, 917 F.2d at 1533.

may become relevant only in the summary judgment, and not the dismissal, context."[29] Therefore, it is of the "utmost importance that parties are aware of the transformation of the motion to dismiss into a motion for summary judgment, and are able to present to the court materials in support of or in opposition to the motion."[30]

Lack of actual notice prevents the nonmoving party from effectively rebutting a summary judgment motion. Also, because the nonmoving party is not adequately apprised of conversion with constructive notice, they are not able to ask the court for an extension *as happened in Ms. Hendrix's case*.

REVIEW IS WARRANTED BY THE IMPORTANT ISSUES AT STAKE

The Individual Respondents committed ILLEGAL acts in addition to their discriminating conduct that Ms. Hendrix can substantiate on paper to a jury. Respondent Zachery was recently forced to retire because he was caught again committing the same ILLEGAL acts.

Ms. Hendrix has spent over eight (8) years of her life bringing this information to the attention of Congress, the news media and the Courts. She has pursued ever avenue open to her to in order to inform government officials and the American public of the Respondents illegal acts. The only request that Ms. Hendrix has made is that the *trier of fact*, a jury, be allowed to determine the merits of her claims.

It is unbelievable that the Courts are more concerned with denying Ms. Hendrix a jury trial based on misrepresentations made **time and again** by a US Attorney rather than seeing that justice is done in this case. The 11th Circuit has consistently applied the 'bright-line' rule to other cases in its jurisdiction. Ms. Hendrix is respectfully requesting that the

same 'bright-line' standard be applied in this case and that it be remanded for trial.

It would be a manifest injustice to the American public as well as to Ms. Hendrix to allow the Individual Respondents, who still hold powerful positions at the IRS, to conclude they are truly above the law because they have learned they can procedurally manipulate the system. As Ms. Hendrix has stated repeatedly – **"If they [Individual Respondents] are willing to give away over $2,300,000 of the American taxpayer's money to get me fired then, what in the world are they doing for themselves?"**

CONCLUSION

For the foregoing reasons, Ms. Hendrix respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted this 22 day of November, 2006.

Sarah Hendrix
134 Summerset Lane
Atlanta, GA 30328
(770) 396-0716 (phone/fax)

NOTARY

CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(b). This petition contains twenty eight (28) pages.

This 22 day of November, 2006.

Sarah Hendrix
Pro Se Petitioner
134 Summerset Lane
Atlanta, GA 30328

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing document upon counsel of record and others as shown by depositing a true copy of the same in the US mail, proper postage prepaid, addressed as follows:

R. David Powell
Assistant US Attorney
600 US Courthouse
75 Spring Street SW
Atlanta, GA 30303

Solicitor of the United States
Room # 5614
Department of Justice
95 Pennsylvania Avenue
Washington, DC 20530-0001

This 22 day of November, 2006.

Sarah Hendrix
Pro Se Petitioner
134 Summerset Lane
Atlanta, GA 30328